In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1242

BRUCE CASE,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

BRIEF OPPOSING CERTIORARI

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Comes now the Attorney General of the State of Oklahoma on behalf of the respondent above named and in answer to the Petition for Writ of Certiorari offers the following brief in opposition thereof.

JURISDICTION

Petitioner seeks review via certiorari of a judgment of the Court of Criminal Appeals of the State of Oklahoma entered on the 12th day of October, 1976, which affirmed his conviction for the crime of Arson in the Second Degree. Petitioner's Petition for Rehearing was denied by said Court on November 4, 1976. The jurisdiction of this Court is invoked via the provisions of 28 U.S.C., § 1257(3).

QUESTION PRESENTED

Did the retrial of petitioner, after reversal of his prior conviction wherein the jury imposed a punishment of a monetary fine, violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution where the second jury assessed punishment of five (5) years imprisonment and where the trial judge denied petitioner's request to waive jury sentencing?

STATEMENT OF CASE

In Case No. CRF-72-11, petitioner was tried and convicted upon jury trial of the offense of Arson in the Second Degree in the District Court of Alfalfa County, State of Oklahoma. The punishment imposed by the jury consisted of a fine against petitioner in the amount of Twelve Thousand Dollars ($12,000.00). Judgment and sentence was rendered against petitioner by the Court in accordance with the verdict of the jury on March 6, 1973. Petitioner then sought direct appeal of his conviction to the Oklahoma Court of Criminal Appeals, Case No. F-73-303. Upon review, said appellate court reversed and remanded for new trial on the basis that certain evidence admitted at trial over the objection of petitioner should have been suppressed. The opinion of the state court was filed on February 13, 1974, and mandate was accordingly issued on March 1, 1973.

Subsequently, on October 21, 1974, petitioner was again prosecuted for the offense of Arson in the Second Degree in the District Court of Alfalfa County, State of Oklahoma. In said case, the jury found petitioner guilty of the crime

charged and imposed punishment at a term of five (5) years imprisonment. Thereafter, petitioner appealed his conviction to the Oklahoma Court of Criminal Appeals, Case No. F-74-258. The Oklahoma Court of Criminal Appeals affirmed the conviction, Case No. F-75-258, case reported and cited, *Case* v. *State*, Okl. Cr., 555 P.2d 619, 625 (1976).

ARGUMENT AND AUTHORITIES

Petitioner maintains that this Honorable Court's mandate in the cases of *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 656 (1969), and *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973), render his jury-imposed punishment of imprisonment in the second trial constitutionally infirm in violation of the Due Process Clause of the United States Constitution. Petitioner, in effect, contends that the more severe sentence imposed by the jury in the second trial was both "vindictive" and in retaliation for his previously successful appeal. Petitioner offers the following reason for this position: (1) petitioner was the first individual prosecuted and convicted for the crime of Arson in Alfalfa County in over five years; (2) petitioner's reversal of the conviction by the Oklahoma Court of Criminal Appeals received some notoriety in the local newspaper, "The Cherokee Messenger"; (3) between the date of reversal and retrial, four buildings in Cherokee, Oklahoma, the county seat, were severely damaged by fire; (4) criminal charges of arson arose from these fires and the accused in said cases was not tried for these offenses at the time petitioner received his second trial; (5) at retrial, six members of the jury during voir dire

who ultimately sentenced petitioner admitted to having read something about petitioner's case in the newspaper.

Petitioner adds that, because Alfalfa County is a sparsely populated area, the conclusion is compelled that the jury imposed the harsher punishment in the second trial in violation of the guidelines set forth in *Pearce*, supra, and *Chaffin*, supra. In support, petitioner notes that the closeness of the community is demonstrated by the various juror's specific knowledge of petitioner's situation as this information surfaced during voir dire. Petitioner speculates that, under these circumstances, it is a logical assumption that the circumstances surrounding petitioner's first conviction, along with the unrelated arson charges, must have been matters of common knowledge throughout the community.

Respondent, State of Oklahoma, is firmly convinced that petitioner's argument is highly speculative at best. Toward this view, respondent deems it necessary to briefly consider the relevant cases interpreting and explaining the applicable due process standard raised herein.

In *North Carolina* v. *Pearce*, supra, this Court held that the Due Process Clause protects a defendant from both actual vindictiveness and fear of retaliation for the exercise of his constitutional right to appeal a conviction. Indeed, an accused must not be penalized for asserting his right to a new trial by the imposition of a longer sentence than he received at the first trial. In order to implement this decision, this Court imposed certain requirements on a trial judge who exacts more severe sentences on retrial. Specifically, in *Pearce*, this Court required that, if a longer

sentence is imposed after retrial, the reasons for the increased sentence must affirmatively appear on the record and those reasons "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."

Subsequent cases have revealed that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a "realistic likelihood of vindictiveness." *Blackledge* v. *Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). Similarly, in the case of *Colten* v. *Kentucky*, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972), this Court refused to extend the scope of *Pearce*, supra, to the possibility of increased sentences in a two-tiered system of a criminal adjudication because of the improbability of "vindictiveness." Nor, was the *Pearce* doctrine applicable in a criminal system where the jury under state law was entrusted with sentencing. See *Chaffiin*, supra.

As this Honorable Court very eloquently stated in *Blackledge* v. *Perry*, supra, a consideration of these decisions establishes that increased sentences upon a retrial do not per se violate due process, to-wit:

> "The lesson that emerges from *Pearce*, *Colten* [*Colten* v. *Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L.Ed.2d 584 (1972)], and *Chaffin* [*Chaffin* v. *Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed.2d 714 (1973)] is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose *a realistic likelihood of 'vindictiveness.'* Unlike the circumstances presented by those cases, however, in the situation here the cen-

tral figure is not the judge or the jury, but the prosecutor. The question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case." *Blackledge*, supra, at p. 634. (Emphasis added)

In view of the facts of the instant case, a brief review of the decision in *Chaffin*, supra, is particularly instructive since both convictions were rendered upon trial by jury. In *Chaffin*, this Court addressed the question of whether the *Pearce*-type restrictions should extend to jury sentencing. In so doing, this Court at the outset reaffirmed and acknowledged the underlying principle of *Pearce*, supra. That is, "vindictiveness against the accused for having successfully overturned his conviction has no place in the resentencing process, whether by judge or jury." *Chaffin*, supra, at page 718. This Court, however, declined to extend the *Pearce* rationale to the jury situation in holding that the rendition of the higher sentence by a jury upon retrial is constitutionally permissible so long as the jury is ignorant of the prior sentence and the second sentence is not otherwise shown to be the product of "vindictiveness." The Court also indicated that such a possibility has no "chilling effect" on a criminal defendant's right to challenge his first conviction, whether direct or collateral in nature.

In reaching this determination, this Court explained in detail that the sentencing by a second jury does not present the same opportunity for vindictiveness and retaliation that exists when the same judge imposes both sentences of punishment. Specifically, this Court reasoned that the potential for abuse when dealing with two different juries is "de

minimis" in a properly controlled trial environment and added:

> ". . . It has been conceded in this case that the jury was not informed of the prior sentence. We have no reason to suspect that this is not customary in a properly tried jury case. It is more likely that the jury will be aware that there was a *prior trial*, but it does not follow from this that the jury will know whether that trial was on the same charge, or whether it resulted in a conviction or mistrial." *Chaffin*, supra, at p. 723. (Emphasis added)

Additionally, in *Chaffin*, this Court discussed other factors distinguishing the jury and judge sentencing scenario. In the jury retrial, unlike the judge, the jury has no "personal stake in the prior conviction and no motivation to engage in self-vindication." Next, the jury would not be sensitive to institutional interests and needs as opposed to a judge who may consider such in assessing more severe sentences. Moreover, practically speaking, the jury sentencing is unlike judicial sentencing in that it would be exceedingly difficult for a jury to place in the record the reasons for its sentencing, etc. Thus, the primary thrust of the *Chaffin* decision necessarily rests on the judicial recognition "that jury sentencing is not susceptible to the abuse that prompted the *Pearce* decision." It is submitted that this does not necessarily signify that the *Pearce* standards are eliminated or relaxed in the jury sentencing environment. However, it does indicate that those defendants such as petitioner who advocate a *Pearce* violation in the jury sentencing situation bear an onerous burden in sustaining such an allegation. This heavy burden evolves from a consideration of the basic composition and nature of the jury as a legal institution in contrast to judicial sentencing.

In considering these legal precepts, respondent submits that, in the case at bar, the facts simply do not logically support the bald conclusion that the jury imposed sentence on retrial is attributable to vindictiveness. At most, the record suggests the conclusion that some members of the sentencing jury had previously read some newspaper account of the petitioner's case. However, nowhere does the record establish or infer that any juror had specific knowledge or recollection of the petitioner's prior trial or sentence imposed. Admittedly, it is indisputable that Alfalfa County is a rather small and sparsely populated area. But this element by itself does not substantiate even a logical inference of vindictiveness on the part of this jury. Indeed, if this were true, the identical argument could be interposed in any retrial conviction rendered in a county of this size. Similarly, a careful review of the record reflects that there is no mention in the presence of the jury of the unrelated arson charges. Indeed, as the Oklahoma Court of Criminal Appeals noted in its opinion, all parties at trial were admonished by the trial judge not to do so. Moreover, it is important that the trial judge allowed the petitioner considerable latitude during his voir dire of prospective jurors. It is respectfully submitted that, under these circumstances, petitioner has wholly failed to sustain the burden announced in *Chaffin*, supra, of establishing a "realistic likelihood of vindictiveness."

Petitioner also argues that even in the absence of vindictiveness the harsher sentence imposed by the jury had an impermissible "chilling effect" on the exercise of his right to appeal the first conviction. Petitioner premises this on the fact that the judge at trial denied him an opportunity

to choose between judge and jury sentencing. Petitioner argues that one of the primary reasons for this Court's rejection of the "chilling effect" argument in *Chaffin*, supra, was that a more severe sentence is a remote consideration when a defendant considers an appeal, partially because he has the opportunity upon retrial to select a trial by judge with the *Pearce* restrictions or trial by jury.

Respondent maintains that a careful reading of this Honorable Court's opinion in *Chaffin*, supra, resolves this issue. Respondent would initially note that the choice of a judge or jury trial was not denied petitioner. Clearly, if petitioner had opted for a judge trial, then the judge would have imposed sentence after finding him guilty of the crime charged and would have been bound by the restrictions enunciated in *Pearce*, supra. However, as the record discloses, petitioner elected a trial by jury, thereby waiving the opportunity to be sentenced by the judge under Oklahoma law. The State law requires that the jury have the first opportunity to assess punishment at a jury trial. 22 O.S. 1971, § 926; *Reddell* v. *State*, Okl. Cr., 543 P.2d 574 (1975).

As this Court noted in *Chaffin*, supra, the Constitution does not forbid every government imposed choice in the criminal process which has a dissuading effect on the exercise of a constitutional right. *Brady* v. *U. S.*, 397 U.S. 742, 25 L.Ed.2d 747, 90 S.Ct. 1463 (1970); *Parker* v. *North Carolina*, 397 U.S. 790, 25 L.Ed.2d 785, 90 S.Ct. 1458 (1970). Indeed, with respect to a potential "chill" on a convicted defendant's right to appeal, many "contingencies must coalesce." *Chaffin*, supra. Even then, as this Court noted in *Chaffin*, the choice occasioned by the possibility of a harsher sentence does not impermissibly infringe on the right to

make a free choice as to whether to appeal. As stated previously, petitioner made his decision to appeal freely, just as he freely exercised his right to select a jury trial on retrial.

CONCLUSION

THEREFORE, premises considered, respondent submits that certiorari should be denied.

Respectfully submitted,

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May, 1977

CERTIFICATE OF MAILING

This is to certify that a copy of the foregoing instrument to which this certification is attached was mailed to the following this ..... day of ....., 1977:

Stephen Jones
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.....
ROBERT L. McDONALD